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In The Supreme Court of the United States

October Term, 1995

United Food and Commercial Workers Union Local 751,

Petitioner,

v.

Brown Group, Inc., d/b/a Brown Shoe Company,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. Brown Shoe seeks to pass this case off as one that turns on inept pleading, *viz.* "the Union's own failure to establish in its complaint its standing" (Opposition at 7) and the Union's failure to amend that complaint in a timely manner (*id.* at 18). According to Respondent, the Eighth Circuit's decision means only that *"this Union"* failed to allege a claim, not that "the provision of the WARN Act granting unions the right to sue was unconstitutional" (*id.*; emphasis in original).

But the precise claim alleged by the Union in its complaint is, as we demonstrated in the Petition, the claim expressly created by Congress. The WARN Act provides

that advance notice of certain plant closings must be given "to each representative of the affected employees" (29 U.S.C. § 2102(a)(1)), that an employer who violates this provision is "liable to each aggrieved employee" for back pay (29 U.S.C. § 2104(a)(1)), and that the "representative of employees . . . may sue" to "enforce *such* liability" (29 U.S.C. § 2104(a)(5); emphasis supplied). The Union's complaint here tracks these provisions as Congress wrote them.

It is therefore no answer to the Petition to suggest, as Respondent does, that the Union should have amended its complaint to seek "prospective relief" rather than money penalties. (Opposition at 18.) Not only did Congress expressly make money penalties the remedy for violation of the WARN Act's advance-notice-to-the-union provision, Congress provided that such penalties "are the *exclusive* remedies for any violation" of the WARN Act. 29 U.S.C. § 2104(b) (emphasis supplied).

Nor is it an answer to the Petition to suggest, as Respondent does, that the Union should "simply have amended its complaint to add as plaintiffs . . . individual employees." (Opposition at 18.) That is another way of stating that Congress can not do what the Legislature so plainly did in the WARN Act.

2. Brown Shoe eventually recedes from its claim that no constitutional question is presented to the claim that the Eighth Circuit's invalidation of part of the WARN Act presents "no fundamental constitutional question." (Opposition at 9.) According to Respondent, this case is controlled by the well-settled rule that "Congress may not eliminate the requirements of Article III" with regard to standing. (*Id.*)

But that rule merely frames the constitutional question here. The crux of the matter is whether "the requirements of Article III" include the requirement that to have standing a plaintiff must be seeking monetary relief that

inures to its direct financial benefit. And, Respondent's full dress argument that this Court's "associational standing" line of cases decide this question in its favor is trebly flawed. That line of cases points the other way and a host of court of appeals' decisions—in conflict with the Eighth Circuit decision in this case—so recognize.

First, this is a case. unlike the cases on which Respondent relies, in which the plaintiff has *itself* suffered a cognizable injury. The WARN Act provides that Brown Shoe must provide advance notice of a plant closing *to the Union*, and Brown Shoe is accused in the complaint of failing to provide that notice *to the Union*. Congress can, without transgressing Article III, "creat[e] legal rights, the invasion of which creates standing." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973).

The issue, then, is whether, having created a legal right, Congress may also create the kind of remedy for invasion of that right created in the WARN Act without running afoul of Article III. The Eighth Circuit held, and Brown Shoe now contends, that this remedy—backpay for employees—will not redress the alleged injury to the Union and the Union therefore does not have standing. (Opposition at 19-30).

As this Court recognized in *North Star Steel Co. v. Thomas*, 115 S.Ct. 1927, 1929 (1995), Congress intended the backpay awards as "penalties" for violation of WARN, presumably because Congress did not wish to authorize a remedy that would interfere directly with the right of employers to terminate operations but did wish to deter employers from doing so in violation of the Act's notice requirements.

This remedial scheme is not unique to the WARN Act, and has not before been thought to raise Article III difficulties. In *PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991), for example, the Third Circuit upheld the standing of an enviornmental group to seek civil money penal-

ties under the Clean Water Act which would be payable to an *environmental trust fund*. The Court stated that

> [w]here Congress has expressly granted a right of action and plaintiffs have shown "a distinct and palpable injury," plaintiffs "may invoke the general public interest in support of their claim." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The general public interest in clean waterways will be served in this case by the deterrent effect of an award of civil penalties. Penalties will deter both [the defendant] specifically and other . . . permit holders. Thus [plaintiff's] members' injuries may be redressed by a favorable decision in this case. [Citations omitted.] Under current constitutional requirements this plaintiff has standing. [*PIRG v. Powell Duffryn Terminals, Inc.*, 931 F.2d at 73.]

The Eighth Circuit's approach to standing here is in conflict with the approach to standing in *Powell Duffryn* and the cases cited therein.

The Eighth Circuit's decision is even more directly in conflict with this Court's decision in *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). In *Hoosier Cardinal*, as here, a union brought suit to redress an injury *to itself* (in that case, the breach of a collective bargaining agreement to which the union was a party; in this case, the failure to provide the union with the statutorily prescribed notice) and the remedy sought in each case was money payments *for the employees the union represents*. The *Hoosier Cardinal* Court expressly held that the Union had standing to do so. 383 U.S. at 699-700.

Respondent would distinguish *Hoosier Cardinal* as a decision related to a claim for breach of a contract, rather than of a statutory notice provision. But no explanation is given as to why this distinction is of any relevance whatsoever for Article III *standing* purposes. In both instances, the salient point is that where a union suffers cognizable legal injury, Congress can provide for

a suit by the union that generates monetary relief to the employees the union represents as a remedy for the union's representational injury.[1]

Second, the associational standing cases Respondent cites, and relies on, "are a particular run of cases dealing with challenges to governmental actions by associations *with no particular entitlement to stand in the shoes of their members.*" *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1319 (7th Cir. 1992) (emphasis supplied). Here the WARN Act *does* provide a "particular entitlement" to the Union to bring this action.

As the Seventh Circuit recognized, "representative damages litigation is common—from class actions under Fed.R.Civ.P. 23(b)(3) to suits by trustees representing hundreds of creditors in bankruptcy to *parens patriae* actions by state governments to litigation by and against executors of decedents' estates." 954 F.2d at 1319. Whether the representative suit will be permitted turns on an examination of the representatives' asserted authority to bring the particular claim. Thus, *Amoco Cadiz*

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[1] Respondent's contention that this case is distinguishable from *Hoosier Cardinal* because individual employees can bring suit directly under the WARN Act whereas "federal courts have held that individual employees do *not* have standing to enforce their [LMRA] Section 301 rights because they are not parties to the collective bargaining agreement between the union and the employer" (Opposition at 30), is based on a complete misreading of the law. Individual employees *can* bring suit for breach of a collective bargaining agreement under § 301. This Court so held in *Smith v. Evening News Assn.*, 371 U.S. 195, 199 (1962), and expressly recognized in *Hoosier Cardinal* that the question whether an *individual* employee could bring suit under § 301 already had been decided in *Smith*. *See Hoosier Cardinal*, 383 U.S. at 700. The lower-court cases relied upon by respondent for the opposite proposition (see Opposition at 30), actually involve the entirely separate question of whether an individual employee has standing to overturn an arbitration award entered pursuant to the collective bargaining agreement.

permits a French trade syndicate to bring suit in federal court for money damages sought as compensation for its members because the law of France authorized such syndicates to act as representatives in such actions. 954 F.2d at 1321-22.

Similarly, in *Hoosier Cardinal*, this Court discerned Congress' intent that the union be authorized as the litigation representative from general doctrine regarding "the union's role in the collective bargaining process." 383 U.S. at 700.

And, as we have stressed, Congress' intent that a union be permitted to sue as representative of its members for violations of the WARN Act is clearly and plainly stated in the Act.

The Eighth Circuit's insistence upon analyzing this case under *Warth v. Seldin*, 422 U.S. 490 (1975), and other associational standing cases, and its concomitant refusal to recognize the significance of Congress' authorization of the Union to act as representative under the WARN Act, is therefore in conflict with *Hoosier Cardinal*, with the Seventh Circuit's decision in *Amoco Cadiz*, and with the many other representational standing cases cited in our Petition at pp. 20-21.[2]

Third, even if this case *were* properly analyzed under the framework established by the associational standing cases—and it is not—this Court has *not*, as Respondent contends, addressed whether the third prong of the *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) associational standing test is of *constitutional*, rather than *prudential*, origin. The supposedly

[2] Respondent's contention that "[t]he Eighth Circuit's reasoning is in harmony with a long line of federal decisions establishing that a union is not "the *general* litigating agent of its members" under federal labor laws (Opposition at 21; emphasis supplied, citations omitted), is unsound in its premise. The Union does not seek in this case to be a "*general* litigating agent," only to bring the specific claim that Congress has authorized the Union to bring.

dispositive passage from *Warth v. Seldin*, 422 U.S. 490 (1975)—cited and relied on by Respondent (Opposition at 25-26)—is, at best, ambiguous on this point:

> Even in the absence of an injury to itself, an association may have standing solely as the representative of its members. The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. [422 U.S. at 511-12; citations omitted.]

The most natural reading of this passage is that the "constitutional requirement of a case or controversy" is satisfied by the demonstration of "actual injury", and that its final sentence provides *additonal, prudential* criteria for the courts in determining whether an association may be an "appropriate" representative of its members where no legislature has spoken to the question in establishing the underlying right.

We therefore end where our Petition ended—the manifest need for this Court to clarify the constitutional status of the *Hunt* test is amply demonstrated by the continuing conflict among the courts of appeals (see cases cited in Petition at 19-20) on the very issue that Respondent claims was decided by this Court 20 years ago.

CONCLUSION

For the foregoing reasons and those stated in the Petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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